1996

National Service Industries, Inc. v. B.W. Norton Manufacturing Company, Inc., a California Corporation : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 960653 CA

NATIONAL SERVICE INDUSTRIES, INC.,	96-0653-CA
Plaintiff/Appellant,	Case No. ~~960130~~
v.	Priority No. 15
B.W. NORTON MANUFACTURING COMPANY, INC., a California Corporation,	
Defendant/Appellee,	
and INTERNATIONAL MACHINE & TOOL WORKS, INC., a Illinois corporation,	
Defendant.	

BRIEF OF APPELLANT

An Appeal from the Dismissal and Summary Judgment of the Third Judicial District Court of Salt Lake County
The Honorable Timothy R. Hanson Presiding

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IN THE UTAH COURT OF APPEALS

NATIONAL SERVICE INDUSTRIES, INC.,	:	
Plaintiff/Appellant,	:	Case No. 960120
v.	:	Priority No. 15
B.W. NORTON MANUFACTURING COMPANY, INC., a California Corporation,	:	
Defendant/Appellee,	:	
and INTERNATIONAL MACHINE & TOOL WORKS, INC., a Illinois corporation,	:	
Defendant.	:	

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Statutes Cited

Rules Cited

Other Authorities Cited

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---oooOooo---

NATIONAL SERVICE INDUSTRIES, INC.,	:	
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JURISDICTIONAL STATEMENT

The Utah Supreme Court has original jurisdiction over this case under Utah Code Anno. §78-2-2(3)j. This case was transferred to the Utah Court of Appeals under the pour over authority described in Utah Code Anno. §78-2-2(4). This court has jurisdiction pursuant to Utah Code Anno. §78-2a-3(2)(k).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

All issues below were decided as a matter of law, and this court does not give deference to the lower court's rulings. *Berube v. Fashion Center, Ltd.*, 771 P.2d 1033,1039 (Utah 1989).

The following issues are presented on appeal:

1. Does Utah's Tort Reform Act (Utah Code Anno. §78-27-37 et. *seq.*) create a right for one defendant to have another co-defendant's proportionate fault determinéd?

(Raised below: Summary Judgment hearing transcript (R. p. 192, l. 24-25 and NSI's memorandum p. 8)

2. Are cross-claims "compulsory," and thus waived if not brought in a suit involving two co-defendants.

(Raised below: Summary Judgment hearing transcript (R p. 202, l. 19-21 and NSI's memorandum p. 3)

3. Does Utah's Tort Reform Act (Utah Code Anno. §78-27-37 *et. seq.*) allow "reimbursement" to NSI of its settlement with the plaintiff Packer (for 100% of Packer's damages), to the extent co-defendant Norton's fault caused these damages?

(Raised below: Summary Judgment hearing transcript (R p.198, l. 1-7 and NSI's memorandum p. 8)

4. Does *res judicata* bar NSI's claim for indemnity against Norton, when the claims were never litigated because of lack of standing.

(Raised below: Summary Judgment hearing transcript (R p.218, l. 21-23 and NSI's memorandum p. 3)

5. In light of the legislature's intent under Utah Code Anno. §78-27-37, *et. seq.*, should this court follow other courts in adopting "comparative implied indemnity" in product liability cases, rather than pure "implied indemnity" which was adopted in Utah in *Hanover Ltd. v. Cessna Aircraft Co.*, 758 P.2d 443 (Ut. App. 1988)?

(Raised below: Summary Judgment hearing transcript (R p. 198, l. 13-16)

6. Do the United States and Utah constitutions require that Norton's fault be determined at some point in the litigation process, and that notice be given NSI of when such claims must be brought? (Raised below: Summary Judgment hearing transcript (R p. 205, l. 13 - p. 206, l. 12 and NSI memorandum at p. 6.)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Constitutional Provisions

The United States and Utah Constitutions demand that NSI be given an opportunity to have Norton's fault determined, and require that the statutes and rules set forth when and how that opportunity is available. Those constitutional provisions are:

United States Constitution, 5th Amendment (Due Process):

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

> the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Utah Constitution, Article 1, Section 7 (Due Process):

> No person shall be deprived of life, liberty or property, without due process of law.

Utah Constitution, Article 1, Section 11 (Open Courts):

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Statutes

The Utah Tort Reform Act (Utah Code Anno. §78-27-37 to 43) requires that no defendant pay more than its proportionate share of fault and that the proportionate fault of each defendant be determined by the fact finder. See Addendum 1 for Utah Code Anno. §78-27-37 to 43.

Rules

Utah Rule of Civil Procedure 13(f) states that cross-claims "may" be brought rather than "shall" as used in Rule 13(a) on "compulsory counterclaims." Rule 13(f) reads:

(f) **Cross-claim against co-party**. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject-matter either of the original action or of a counterclaim therein or relating to any property that is the subject-matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

STATEMENT OF THE CASE

PROCEDURAL BACKGROUND OF CASE

This is the second appeal involving these two parties. The first appeal is *Packer v. National Service Industries*, 909 P.2d 1277 (Ut. App. 1996) (Addendum 2).

Background of First Appeal

The two parties to both these appeals were co-defendants in a suit filed by Sherman Packer who was functionally blinded in one eye when he opened a container manufactured by appellee Norton, and filled with soap by appellant NSI. The container was pressurized, and exploded, driving the seal which covered the pouring spout into Packer's eye.

Plaintiff alleged that the container was negligently designed, and also unreasonably dangerous, since it would become pressurized when shipped from sea level to mountain regions like Salt Lake, and had no warning or means to release the pressure. The

pressurization occurred due to differences in atmospheric pressures which naturally differ with altitude, and will occur whether the container is filled with soap (as NSI used it), water, or even if it is empty. (Affidavit of plaintiff's expert Dr. de Nevers, R. p. 149)

In the first case involving these parties, appellee Norton moved for summary judgment against plaintiff. Plaintiff's counsel was going to resist the motion and obtained an extension to respond. At the last moment, however, plaintiff's counsel decided not to respond, in part because ". . . it literally doesn't make any difference to me if it's both of those defendants at trial or one. I could have made an opposition, and maybe the outcome would be different" (R. p. 194, l.16-19).

Plaintiff's counsel realized that as long as the original judge granted summary judgment and refused to allow the other defendant to claim the dismissed defendant was liable, that plaintiff would still obtain 100% of his damages and yet the plaintiff would not have to contend with two cross-examinations, two opening arguments, two closings, etc. As only one product was involved, either defendant in the chain of distribution would be liable for the unreasonably dangerous product.

Upon hearing that plaintiff had suddenly decided not to resist Norton's Motion for Summary Judgment, co-defendant NSI filed a quick opposition to the Motion for Summary Judgment, but argued that it had no obligation to do so. NSI argued that summary judgment should be granted, since it was not resisted by plaintiff, but that the fault should be determined by the jury since the dismissal was not "on the merits," but was because plaintiff had failed to resist the motion, much like a dismissal for failure to prosecute is not on the merits.

The lower court in the first case heard NSI's arguments, but granted the summary judgment and ruled that Norton's fault would not be determined at trial. The result of the ruling was that NSI would pay Norton's proportionate share of fault, unless Norton's fault was later determined by another court.

NSI later settled with plaintiff during court ordered settlement conferences. Plaintiff demanded 100% of his damages, fearing he could not appeal a summary judgment which he had not resisted, but agreed to cooperate with NSI in pursuing the claims against Norton.

Disposition of Original Appeal

NSI appealed the original court's grant of summary judgment. In the original action, neither Norton nor NSI filed cross-claims

against each other. The appellate court held that since no cross-claim had been filed, there was no standing for NSI to dispute Norton's Motion for Summary Judgment either in the lower court, or on appeal. For additional detail on the suit and appeal, see Addendum 3 (Course of Proceedings Underlying the First Appeal) and Addendum 4 (Statement of Facts Underlying the First Appeal)

PROCEDURAL BACKGROUND OF THE PRESENT CASE

Soon after the summary judgment, NSI sued Norton in the present case asserting a cause of action based on the cross-claims it could have filed in the original case, since Utah Rule of Civil Procedure 13(f) makes cross-claims permissive, not being waived if brought at a later date. Those claims included negligent design in the manufacture of Norton's container, breach of warranty, strict liability, and indemnification, since NSI was a downstream manufacturer.

The lower court in this case made its ruling before the appellate court ruled in the original case. The lower court here ruled that there is no cause of action to have a co-defendant's proportionate fault determined, and dismissed those claims for failure to state a cause of action. On NSI's indemnity claims, appellee Norton argued, and the lower court held, that the original court correctly granted standing to NSI, heard the arguments of

NSI, and ruled against NSI on the merit. The lower court thus determined that the doctrine of *res judicata* precluded the court from allowing the claims to be argued a second time.

When the original appellate court later ruled, its ruling directly contradicted what the lower court here had anticipated. The appellate court ruled there was no standing in the first lawsuit to argue against Norton's summary judgment. NSI's claims have yet to be heard and decided by a court.

STATEMENT OF FACTS RELEVANT TO ISSUES ON APPEAL

1. NSI filed a complaint requesting that Norton's"... percentage or proportion of fault..." be determined. (R. p. 003-4).

2. The compliant had four causes of action, including: "Tort Reform Act, Proportionate Fault" (R. p. 003); "Negligence" (R. p. 004); "Breach of Warranty" (R. p. 005); and "Strict Liability" (R. p. 006).

3.The lower court Ruled "...as a matter of law that the first and second causes of action in the plaintiff's complaint fail to state a claim upon which relief could be granted" (R. p. 164)(Court's Order of Dismissal and Summary Judgment also reprinted in Addendum 5) because there is no claim to have a co-defendant's proportionate fault determined nor a claim for contribution.

4. The lower court granted summary judgment on the third and fourth causes of action as "...barred by *res judicata* doctrine..." (R. p. 165) since the prior "...Packer litigation resulted in a final judgment in favor of B. W. Norton ..." (R. p. 165), and since the "...issues have been determined in a final judgment on the merits in the Packer litigation" (R. p. 166).

5. After the lower court ruled, the appellate court in the original case ruled that "...NSI was not a proper party to the motion for summary judgment brought by Norton, did not have a right...to oppose Norton's motion, and does not have a right to appeal the court's order that granted Norton's motion." (*Packer v. National Service Industries, Inc.*, 909 P.2d 1277, 1278 (Utah App. 1996)(Addendum 2).

6. The appellate court held that "...NSI could have protected its potential claim against Norton by filing a cross-claim against Norton under Utah Rule of Civil Procedure 13(f)." *Id.* 1278.

7. The appellate court also held that "NSI could also protect a possible claim against Norton by filing an independent action claiming indemnity, if filing a cross-claim was considered to be tactically undesirable." *Id.* 1278.

8. The claims which the appellate court ruled could be filed, for Norton's proportionate fault to be determined and for indemnity, were dismissed by the lower court. (R. p. 164-6).

SUMMARY OF ARGUMENTS

I. UTAH CODE ANNO. §78-27-37 CREATES A RIGHT FOR ONE DEFENDANT TO HAVE ANOTHER DEFENDANT'S FAULT DETERMINED.

The Utah Court of Appeals, in the previous case between these two parties, held that a cross-claim may be filed between two co-defendants to have each defendant's proportionate fault determined.

II. CROSS-CLAIMS ARE CLEARLY PERMISSIVE, NOT COMPULSORY.

Utah Rule of Civil Procedure 13(f) states "[a] pleading may state as a cross-claim . . . ." The Federal Rule is the same, and *Moores Federal Practice*, Wright, Miller & Kane's *Federal Practice and Procedure* and case law confirm that "Cross-claims are always permissive" and "[a] party who decides not to bring his [cross-claim] will not be barred . . . ." Wright, Miller & Kane, *Federal Practice and Procedure* §1431.

III. THE UTAH TORT REFORM ACT, UTAH CODE ANNO. §78-27-37 CREATES A CAUSE OF ACTION TO HAVE A PARTY'S PROPORTIONATE FAULT DETERMINED AFTER SETTLEMENT WITH PLAINTIFF.

Utah Code Anno. §78-27-44, *et seq.* specifically creates a cause of action for "reimbursement" which allows NSI to be

reimbursed for its settlement of 100% of plaintiff's damages, to the extent Norton's fault caused those damages.

IV. NSI'S INDEMNIFICATION CLAIMS HAVE NEVER BEEN CONSIDERED BY A COURT AND *RES JUDICATA* DOES NOT BAR THEM.

NSI's indemnification claims have never been considered by a court, and the lower court erred in granting summary judgment based on *res judicata*.

V. "COMPARATIVE IMPLIED INDEMNITY" SHOULD BE ADOPTED BY THIS COURT TO REFLECT LEGISLATIVE INTENT.

This court should adopt "comparative implied indemnity" in product cases, as other courts have done, in light of the Utah legislature's intent that no defendant pay more than its proportionate share.

VI. THE UNITED STATES AND UTAH CONSTITUTIONS GUARANTEE THAT NSI MAY HAVE NORTON'S FAULT DETERMINED AT SOME POINT IN THE COURTS.

ARGUMENT

POINT I: UTAH CODE ANNO. §78-27-37, CREATES A RIGHT FOR ONE DEFENDANT TO HAVE ANOTHER DEFENDANT'S FAULT DETERMINED.

In the previous appeal between these two parties, the appellate court ruled that NSI did not have a right to respond to Norton's Motion for Summary Judgment "[b]ecause NSI did not bring a cross-claim against Norton . . . ." *Packer v National Service*

Industries Inc., 909 P.2d 1277, 1279 (Ct. App. 1996)(Addendum 2). Nor could NSI "appeal the court's order that granted Norton's motion." *Id.* at 1279. In that opinion, the appellate court also stated that ". . . NSI could have protected its potential claim against Norton by filing a cross-claim against Norton under Utah Rule of Civil Procedure 13(f)." *Id.* at 1278. In this very case, the appellate court held that a cause of action, a cross-claim, exists between two defendants under the Utah Tort Reform Act.

While the statute itself does not mention a cross-claim, judicial interpretation, in this very case, makes clear that such cross-claims exist to have a co-defendant's proportionate fault determined.[1]

Utah Code Anno. §78-27-37 defines "defendant" as a person ". . . claimed to be liable because of fault to any person seeking recovery." A "person seeking recovery" is ". . . seeking damages or reimbursement on its own behalf . . . ." Technically, one defendant does not seek damages from another defendant who is already joined as a party, but only seeks to assure the co-defendant's proportionate fault is determined by the fact finder. Thus, a co-defendant is not, in the words of Utah Rule of Civil Procedure 13(f), ". . . liable to the cross-claimant. . ." for a claim of damages, but is liable for that defendant's own proportionate share of fault. Wright, Miller & Kane §1431, p. 231 maintain that a cross-claim that does not ". . . assert a plea for affirmative relief but merely alleges a complete defense . . . ," even though ". . . it intends the cross-claimant is completely blameless. . . does not raise any issue between the co-parties and is not properly assertable under the cross-claim provision." It should also be noted that Utah Code Anno. §78-27-41 allows one

There is then, clearly a cause of action to have a co-defendant's proportionate fault determined. The lower court was incorrect in dismissing the complaint for failure to state a claim. The next question is, when can such a cross-claim be brought.

POINT II: CROSS-CLAIMS ARE CLEARLY PERMISSIVE, NOT COMPULSORY.

A. The Utah Rule, Commentators, and Case Law Confirm Cross-claims Are Permissive and Can Be Brought in a Late Suit.

The appellate court ruled that a cross-claim "could" have been filed. While "could" can be read in the past tense, the court never addressed "when" a cross-claim can be filed. The rules, commentators and cases all hold that a cross-claim is permissive, and can be brought either between two defendants in the original suit, or in a later suit, as was done here.

Utah Rule of Civil Procedure 13(f) states: "A pleading may state as a cross-claim . . . ." (emphasis added)

The rule clearly states that cross-claims "may" be brought. This rule contrasts with Rule 13(a) which is entitled "Compulsory Counterclaims", and uses the word "shall" instead of "may".

The Federal Rule and Utah's rule on cross-claims are the same, although Utah's is Rule 13(f) and the federal cross-claim rule is

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"defendant" to ". . . join as a defendant . . ." any other person who may have contributed to the damage, although "join" is referred to in the sense of adding a person not yet a party to the lawsuit.

13(g). *Moore's Federal Practice* confirms cross-claims are permissive, and may be pleaded later if the defendant so chooses. "The subdivision [on cross-claims], though reading much like subdivision (a) concerning compulsory counterclaim, is permissive; the claim may, but need not, be pleaded." Moore's Federal Practice 2d ¶13.34[1]. (Emphasis in original).

Wright, Miller, and Kane, *Federal Practice and Procedure*, §1431, also states this clear principle:

> Rule 13(g) [cross-claims], unlike Rule 13(a) [counterclaims], always is permissive. A party who decides not to bring his claim under Rule 13(g) will not be barred by *res judicata*, waiver, or estoppel from asserting it in a later action, as he would if the claim were a compulsory counterclaim under Rule 13(a)." (Emphasis added)

Since a cross-claim is permissive, it is not waived if not filed in the original suit. Importantly, if there is no such independent cause of action to have a co-defendant's proportionate fault determined, there is no such cross-claim either.

> Although Rule 13(g) permits a party to assert, by way of cross-claim, a claim which could be asserted only in an independent action except for the authorization of subdivision (g), the Rule does not affect substantive rights. . . . The cross-claimant must have a valid claim against his co-party. Whether he has such a claim is a substantive matter; whether he may assert it in a suit brought against him or his co-party or must bring an independent action is procedural.

Moore's Federal Practice 2d ¶13.37 (emphasis added).

Case law holds the same.

> Under both federal and Missouri law it is clear that cross-claims are merely permissive rather than compulsory. [cit. Omitted] Accordingly, a party to an action having a claim in the nature of a cross-claim has the option to pursue it in an independent action.

Augustin v Mughal, 521 F.2d 1215 at 1216(8th Cir 1975)(emphasis added).

Since a cross-claim exists between two defendant's to have each others proportionate fault determined, the lower court erred in dismissing the complaint below. Since it was not brought in the original suit, it may be brought now. The lower court erred in dismissing that claim.

There is no question that any cross-claim, including one under Utah Code Anno. §78-27-37, et. seq. between co-defendants to have each other's fault determined is permissive. Since cross-claims are always permissive, the lower court erred in dismissing the suit, holding no such claim exists. The lower court made its ruling before the appellate opinion clarifying that a cross-claim exists. Thus, the lower court erred in dismissing the claim.

NSI has a substantive right to sue Norton to have its proportionate fault determined. NSI can do so, procedurally, either in a separate suit or a cross-claim. If there is no such substantive cause of action, there is no cross-claim that could

have been filed as the appellate court held. The statute and the appellate court confirm such a right exists. Rule 13(f) makes clear the right is permissive and not waived if not brought in the original suit. Not aware of the appellate court ruling, the lower court erred in dismissing the suit.

> Court: If you tried to file a cross-claim in my court against a defendant who was either not named, or was named, for anything other than ensuring they were on the jury verdict for determination of responsibility, assuming there was some evidence they had some responsibility, I wouldn't allow it because you can't file a cross-claim for contribution. You can, under the statute, ask the court to include either a non-party, and if they are a co-party, they'll be in, if there's any evidence to have their fault evaluated.

The lower court construed the claim as one for contribution, and was of the opinion that no claim exists between two co-defendants to have each other's proportionate fault determined. The original appellate opinion between these two parties specifically allows bringing a cross-claim. Utah Rule of Civil Procedure 13(f) makes clear cross-claims are permissive, and may be brought in a separate suit. Moore's, Wright, Miller and Kane and case law confirm the obvious. Cross-claims are, in Wright, Miller and Kane's words "always permissive," and "a party who decides to bring his claim under Rule 13(g) [Utah's 13(f)] <u>will not be barred</u> . . . ." Wright, Miller & Kane, *Federal Practice and Procedure* §1431.

B. Policy Reasons Behind Permissive Cross-claims.

Wright, Miller & Kane's *Federal Practice and Procedure* §4450, p. 424 discusses the considerations that ". . . are doubtless accountable for the general rule that cross-claims among co-parties are permissive, not mandatory." Among the considerations are that the co-defendants had no say in the choice of form, timing of the litigation, and "[m]ore important, the strategic impact of party alignment is quite different." *Id.* Several examples are given of defendant's incentives ". . . to reduce the total extent of liability rather than adjust the claims of the defendants." *Id.* They acknowledge such concerns may be "mere irrationalities" but conclude "[t]hey are vitally real nonetheless" and must serve as a basis of rules.

There is no need to fear duplicate lawsuits, where co-defendants have a trial against the plaintiff, obtain a verdict dividing their fault, and then sue each other a second time if they are displeased with the percentage of fault assigned them in the first trial. Established law of *res judicata* prevents duplicate litigation, not to mention the expense. But here the later filed cross-claim is allowed by the rules. Norton has not had its fault determined. There is no judgment on the merits as required by *res judicata*.

Cross-claims are clearly permissive, for good reason. The rule on cross-claims allow co-defendants who have an independent action, to bring the claim, if they desire, in the suit with the original plaintiff. The appellate court held such a cross-claim exists. The lower court has erred in dismissing the complaint for failure to state a claim.

POINT III: THE UTAH TORT REFORM ACT, UTAH CODE ANNO. §78-27-37 CREATES A CAUSE OF ACTION TO HAVE A PARTY'S PROPORTIONATE FAULT DETERMINED AFTER SETTLEMENT WITH PLAINTIFF.

A second, independent reason the lower court erred in dismissing the claim to have Norton's proportionate fault determined is that the tort reform statute allows a settling party to sue for "reimbursement." Utah Code Anno. §78-27-37, states that "'Persons seeking recovery' means any person seeking damages or reimbursement on its own behalf. . . ." NSI is seeking "reimbursement on its own behalf" as specifically authorized by the statute.

When Norton's original summary judgment was granted, Norton did not participate in several court ordered settlement conferences. Plaintiff was reasonable in his settlement demands, but insisted that the entire amount be paid by NSI, since Norton had received summary judgment. Plaintiff refused to appeal the

summary judgment he had not resisted, (even questioning his standing to do so since he had never resisted it) but offered to assist NSI in a trial against Norton if NSI would pay all of his damages. Plaintiff has now been made whole.

NSI needs to have Norton's proportionate fault determined, so it can be "reimbursed" for that portion of Plaintiff's injuries caused by Norton. "Reimbursement", as used by the statute has been interpreted by the Supreme Court, in *Sullivan v. Scoular Grain*, 853 P.2d 877 at 881(Utah 1993), to include employers and their insurance carriers, under the Worker's Compensation Act, as such persons seeking "reimbursement". Similarly, NSI is seeking reimbursement, as the act specifically authorizes.

Courts have always encouraged settlement. Because Norton was granted summary judgment, it did not participate in the settlement conferences, nor in the settlement. The statute recognizes that a settling party should not be penalized. The statute authorizes NSI to sue for "reimbursement," allowing cases to settle, when not all parties are present.

The tort reform statute's very purpose is ". . . to ensure that 'no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant'" *Sullivan*, supra, at 880 (quoting Utah Code Ann. §78-

27-38). The statute allows for unusual situations, such as this, by allowing a party to be "reimbursed" for a reasonable settlement. Again, the complaint states a cause of action. The lower court erred in dismissing it.

POINT IV: NSI'S INDEMNIFICATION CLAIMS HAVE NEVER BEEN CONSIDERED BY A COURT AND *RES JUDICATA* DOES NOT BAR THEM.

Background of the Indemnity Claim.

Hanover Ltd. v. Cessna Aircraft, 758 P.2d 443 (Ut. App. 1988), held that, under certain circumstances, a upstream manufacturer in a strict liability case, must indemnify the downstream distributor not only for a judgment or settlement, but also attorney's fees and costs. Here, Norton manufactured the container, and included in its product, as delivered to NSI, the sharp-edged seal which struck Mr. Packer's eye. NSI made no alteration to the seal or container. NSI received the container, including the seal, put liquid in the container, precisely as intended by Norton, and sold the container to Mr. Packer. The Complaint stated a claim for indemnification. The breach of Warranty claim is similar.

Summary Judgment Based on *Res Judicata*.

The court acknowledged that the complaint stated a claim for indemnity, but granted summary judgment based on *res judicata*. The lower court stated:

> In all candor [counsel] where Judge Brian [original lower court judge] entered a summary judgment where you were present and had the opportunity to be heard, and I don't buy into the argument that you don't, as a co-defendant in a nexus case, don't have standing, I just don't, I think you do, I think you have all the right to come down and squawk about summary judgment . . . ."

R. p. 218, l. 8-14

"The doctrine of *res judicata* serves the important policy of preventing previously litigated issues from being relitigated." *Salt Lake City v. Silver Fork Pipeline Corp.*, 279 Utah Adv. Rep. 3 (Utah 1995). Here however, the court of appeals ruled there was no standing, and the claims were never heard, no judgment was entered.

Even if a judgment had been entered, the lower court would have to determine if there had been a "full and fair opportunity" to litigate the claims, since the parties were co-defendants, and may not press their claims against each other. "The rendition of a judgment in an action does not conclude parties to the action who are not adversaries under the pleadings as to their rights inter se upon matters which they did not litigate, or have an opportunity to litigate, between themselves." (quoting Restatement of Judgments §82 (1942)). The party barred from litigating a claim in a subsequent action must have had a full and fair opportunity to litigate the same claim in the prior case." *Id.* The same case concluded: "Silver Fork made no claims, litigated no issues, and

had no right of appeal against its co-plaintiff, Salt Lake City" *Id.*, so it was not precluded from litigating the claims.

Here, the merits were never considered, there is no final judgment on the merits. The lower court believed that the first appellate court would allow standing and decide, on the merits, if Norton had fault. In actuality, the court ruled that procedurally there was no standing, and there was no right to resist the original motion. Norton has never had its fault determined. Far from having the merits decided twice, Norton has yet to have its fault determined. The case should be remanded for trial on the merits of the indemnification claims.

POINT V: "COMPARATIVE IMPLIED INDEMNITY" SHOULD BE ADOPTED BY THIS COURT TO REFLECT LEGISLATIVE INTENT.

The Utah Tort Reform Statute provides that NSI can sue Norton for its proportionate share of fault. However, if this court disagrees, this court should adopt "comparative implied indemnity" in product liability cases. Other courts, not having the benefit of a statute, have been faced with the intent of the legislature to have each party pay its proportionate share, and the inequity of implied indemnity in product liability cases, which requires a co-defendant to be 100% free from fault in order to recover. The

original appellate court acknowledged NSI's right to sue Norton for indemnity.

Implied indemnity in product liability cases was adopted in *Hanover Ltd. v Cessna Aircraft Co.*, 758 P.2d 443 (UT Ct App 1988). While implied indemnity as adopted in *Hanover* allows NSI to proceed against Norton, it has two inherent inequities. The first inequity is, of course, that pure implied indemnity is 'all or nothing'.

A. Pure Implied Indemnity is Unfair and Violates Legislative Intent.

If NSI is 1% liable, and Norton 99%, NSI receives nothing. This unfair result flies in the face of the legislature's intent in enacting comparative fault. The Utah Supreme Court held that the purpose of the Utah Tort Reform statute is ". . . to ensure that 'no defendant is liable . . . in excess of the proportion of fault attributable to that defendant." *Sullivan* at 880. "Pure" implied indemnity violates the very intent of the Tort Reform Statute, by allowing a tort feasor who is 99% at fault, to pay absolutely nothing. Here, if NSI is only 1% at fault, it can pay 100% of the damages.

When the Utah courts adopted pure implied indemnity, the Tort Reform Statute was not yet law. Now that the legislature has made clear that no party is liable in excess of its proportionate fault,

this court should adopt "comparative" implied indemnity to reflect the legislature's intent. Utah Code Anno. §78-27-37(2) specifically says that "fault," as used in the act, includes ". . . strict liability, breach of . . . warranty of a product, [and] products liability . . . ." The legislature intended that no defendant in a product case pay more than its proportionate share.

Numerous courts have realized this in equity, and adopted a version of "impled comparative indemnity". Kansas, New York and other courts have applied the fairness of comparative law by adopting "comparative" implied indemnity.

In *Kennedy v. City of Sawyer*, 618 P.2d 788, 800 (Kan. 1980), the Supreme Court of Kansas recognized that "[t]he traditional implied indemnity . . . has been at best a 'blunt instrument' for reallocating loss." The Kansas court concluded that:

> A large and well-reasoned body of law in comparative negligence jurisdictions has determined that the concept of active/passive negligence has been extinguished by the introduction of comparative negligence.

Kennedy, supra, at 800. The Kansas court noted that

> The [US] Supreme Court in *Reliable Transfer* held that the rule merely replaced one unfairness with another, and concluded that the responsibility for damages as between two wrongdoers should be determined by their relative percentages of fault.

Kennedy, supra, at 801.

The Kansas court ". . . re-evaluat[ed] well-established common-law rules in light of recently adopted principles of comparative negligence," [*Kennedy*, supra, at 802.], and concluded that:

> When as here a settlement for plaintiffs' entire injuries or damages has been made by one tort feasor during the pendency of a comparative negligence action and a release of all liability has been given by the plaintiffs to all who may have contributed to said damages, apportionment of responsibility can then be pursued in the action among the tort feasors.

Kennedy, supra, at 803.

In this case, NSI settled all of plaintiff's claims, avoiding a very expensive trial (one expert had charged $29,000 without being deposed). NSI believes the settlement was favorable. Norton will share in NSI's favorable settlement, or if Norton can prove NSI settled rashly, Norton will pay a portion of a smaller verdict.

B. Comparative Implied Indemnity Does Nothing to Alleviate the Unfairness in Negligence or Other Cases.

Comparative implied indemnity cures the inequity of one defendant paying for another defendant's fault in product liability cases, but does nothing to cure that problem in negligence or other cases. This case involves claims of negligence, product liability and breach of warranty.

Implied indemnity, even when treated comparatively, only applies to product liability claims. There is no reason to allow comparative impled indemnity on the product liability claim, but no reimbursement on the negligence claim. NSI maintains that the better course for this court to take is to simply follow Utah Code Anno. §78-27-37 *et seq.* and allow reimbursement from Norton, proportionate to Norton's fault, because the statute creates a cause of action between co-defendants, as held by the previous appellate court. Utah Code Anno. §78-17-37 language provides for reimbursement due to all fault, not just product liability claims.

This court, if it declines to allow NSI to proceed against Norton based on Norton's proportionate fault under Utah Code Anno. §78-17-37, et seq. should modernize Utah's implied indemnity referred to by the appellate court, and allow NSI to proceed with its indemnity claim based on comparative principles.

POINT VI: THE UNITED STATES AND UTAH CONSTITUTIONS GUARANTEE THAT NSI MAY HAVE NORTON'S FAULT DETERMINED AT SOME POINT IN THE COURTS.

A. Norton Argues That NSI Has No Current Claim Since It Did Not File A Cross-Claim.

Norton must acknowledge that NSI has a constitutional right to have Norton's fault determined, but Norton claims that right was

waived when NSI did not file a permissive cross-claim in the first case.

Norton has cited no law below that cross-claims are "compulsory" and has cited no reasons that 'compulsory' cross-claims would be either fair or efficient. Norton has claimed that the courts are now powerless to determine its fault, since no cross-claim was filed in the original proceeding.

Even if Norton were correct, that cross-claims were compulsory, notice must be given litigants of that fact. The rule on cross-claims does not give notice they are compulsory and are waived if not brought. The case law and commentators do not inform litigants that cross-claims are compulsory. In fact, the rule, the case law, the commentators all advise litigants that cross-claims are permissive, and by their very nature must state a cause of action that can be brought independently. This is why neither Norton or NSI filed cross-claims, and why such cross-claims were virtually unheard of before this case.

Norton's claim of no remedy, if followed by this court, would result in the deprivation of constitutional rights, including a denial of due process (United States Constitution, 5th Amendment; Utah Constitution, Article 1, Section 7), and the open courts provision in Article 1, section 11 of the Utah Constitution.

"The open courts provision guarantees 'access to the courts and a judicial procedure that is based on fairness and equality,' and prevents arbitrary deprivation of 'effective remedies designed to protect basic individual rights.'" *Currier v. Holden*, 862 P.2d 1357 (Ut. App. 1993) quoting *Berry ex rel. Berry v. Beech Aircraft*, 717 P.2d 670 (Ut. 1985).

"Timely and adequate notice and an opportunity to be heard in a meaningful way are the very heart of procedural fairness." *Nelson v. Jacobsen*, 669 P.2d 1207, 1211 (Utah 1983). Norton's fault must be determined, and the right to have it determined cannot be waived by failing to file a permissive cross-claim. Under the circumstances of this case, Norton's proportionate fault needs to be determined here, or due process and the open courts provision are violated.

B. Summary.

The essential question before this Court is whether cross-claims are compulsory, and if not brought in a lawsuit between co-defendants are forever waived. The answer is clear. The rules of civil procedure, both federal and Utah, have never made cross-claims compulsory and there are a host of reasons for them not being compulsory. Usually, issues of cross-claims are resolved in the first suit. They would have been resolved in this case had the

plaintiff resisted the motion for summary judgment. Under unusual circumstances, as here, the cause of action underlying the cross-claim, and the statute which specifically allows a suit for reimbursement, allow the defendant's proportionate fault to be determined. Principles of *res judicata* will prevent unnecessary re-litigation of the same issues. In this case, there is yet to be litigation of the cases issues. The complaint states a claim.

CONCLUSION

Norton was sued because a container it manufactured unquestionably injured a person. Norton may claim the pressure in the container was not related to the manufacturing process it conducted. But those are factual questions. To date, the first appellate court declined to decide on the facts because of a procedural issue, lack of standing. The second lower court, believing there was standing and that the appellate court would so rule, dismissed the case as having already been heard. Norton's fault has never been determined, and the constitutions of the United States and Utah provide that this injustice be remedied.

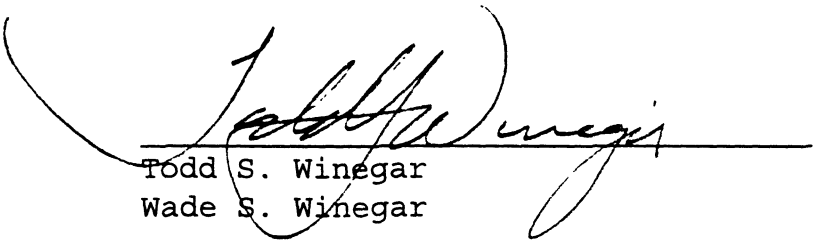
The first appellate court ruled that a claim exists between co-defendants to have each others fault determined. The very basis of the Utah Tort Reform Act is to insure that one defendant does not pay another defendant's proportionate share of fault. The rule

and supporting authorities make clear that if a cause of action exists to bring a cross-claim, the same cause of action exists to bring an independent action. The rule on cross-claims governs only if that cause of action may be asserted in the earlier form that the plaintiff has chosen. Principles of *res judicata* will prevent duplicate litigation.

NSI brought its cause of action in the lower court. That court did not yet have the advice of the first appellate court, and ruled inconsistently with the appellate court's decision. This court should remand this case for trial on the merits of the percentage of fault that Norton's container caused.

DATED this 9th day of October, 1996.

POWELL & LANG, LC



Todd S. Winegar
Wade S. Winegar

CERTIFICATE OF SERVICE

I hereby certify that on the 22 day of October, 1996 I mailed a true and correct copy of the foregoing to the following:

Paul M. Belnap
Robert L. Janicki
STRONG & HANNI
Attorneys for the defendant/appellee
B.W. Norton Manufacturing
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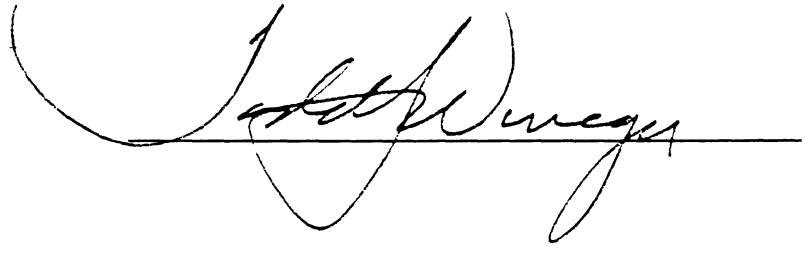

ADDENDUM 1

Utah Code Anno. §78-27-37 to 43

78-27-37. Definitions.

As used in Sections 78-27-37 through 78-27-43:

(1) "Defendant" means a person, other than a person immune from suit as defined in Subsection (3), who is claimed to be liable because of fault to any person seeking recovery.

(2) "Fault" means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification or abuse of a product.

(3) "Person immune from suit" means:

(a) an employer immune from suit under Title 35, Chapter 1 or 2; and

(b) a governmental entity or governmental employee immune from suit pursuant to Title 63, Chapter 30, Governmental Immunity Act.

(4) "Person seeking recovery" means any person seeking damages or reimbursement on its own behalf, or on behalf of another for whom it is authorized to act as legal representative. 1994

78-27-38. Comparative negligence.

(1) The fault of a person seeking recovery shall not alone bar recovery by that person.

(2) A person seeking recovery may recover from any defendant or group of defendants whose fault, combined with the fault of persons immune from suit, exceeds the fault of the person seeking recovery prior to any reallocation of fault made under Subsection 78-27-39(2).

(3) No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant under Section 78-27-39.

(4) (a) In determining the proportionate fault attributable to each defendant, the fact finder may, and when requested by a party shall, consider the conduct of any person who contributed to the alleged injury regardless of whether the person is a person immune from suit or a defendant in the action and may allocate fault to each person seeking recovery, to each defendant, and to any person immune from suit who contributed to the alleged injury.

(b) Any fault allocated to a person immune from suit is considered only to accurately determine the fault of the person seeking recovery and a defendant and may not subject the person immune from suit to any liability, based on the allocation of fault, in this or any other action. 1994

78-27-39. Separate special verdicts on total damages and proportion of fault.

(1) The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery, to each defendant, and to any person immune from suit who contributed to the alleged injury.

(2) (a) If the combined percentage or proportion of fault attributed to all persons immune from suit is less than 40%, the trial court shall reduce that percentage or proportion of fault to zero and reallocate that percentage or proportion of fault to the other parties in proportion to the percentage or proportion of fault initially attributed to each party by the fact finder. After this reallocation, cumulative fault shall equal 100% with the persons immune from suit being allocated no fault.

(b) If the combined percentage or proportion of fault attributed to all persons immune from suit is 40% or more, that percentage or proportion of fault attributed to persons immune from suit may not be reduced under Subsection (2)(a).

(c) (i) The jury may not be advised of the effect of any reallocation under Subsection (2).

(ii) The jury may be advised that fault attributed to persons immune from suit may reduce the award of the person seeking recovery.

(3) A person immune from suit may not be held liable, based on the allocation of fault, in this or any other action. 1994

78-27-40. Amount of liability limited to proportion of fault — No contribution.

(1) Subject to Section 78-27-38, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant.

(2) A defendant is not entitled to contribution from any other person.

(3) A defendant or person seeking recovery may not bring a civil action against any person immune from suit to recover damages resulting from the allocation of fault under Section 78-27-38. 1994

78-27-41. Joinder of defendants.

(1) A person seeking recovery, or any defendant who is a party to the litigation, may join as a defendant, in accordance with the Utah Rules of Civil Procedure, any person other than a person immune from suit who may have caused or contributed to the injury or damage for which recovery is sought, for the purpose of having determined their respective proportions of fault.

(2) A person immune from suit may not be named as a defendant, but fault may be allocated to a person immune from suit solely for the purpose of accurately determining the fault of the person seeking recovery and a defendant. A person immune from suit is not subject to any liability, based on the allocation of fault, in this or any other action.

(3) (a) A person immune from suit may intervene as a party under Rule 24, Utah Rules of Civil Procedure, regardless of whether or not money damages are sought.

(b) A person immune from suit who intervenes in an action may not be held liable for any fault allocated to that person under Section 78-27-38. 1994

78-27-42. Release to one defendant does not discharge other defendants.

A release given by a person seeking recovery to one or more defendants does not discharge any other defendant unless the release so provides. 1986

78-27-43. Effect on immunity, exclusive remedy, indemnity, contribution.

Nothing in Sections 78-27-37 through 78-27-42 affects or impairs any common law or statutory immunity from liability, including, but not limited to, governmental immunity as provided in Title 63, Chapter 30, and the exclusive remedy provisions of Title 35, Chapter 1. Nothing in Sections 78-27-37 through 78-27-42 affects or impairs any right to indemnity or contribution arising from statute, contract, or agreement. 1986

ADDENDUM 2

Packer v National Service Industries Inc.,
909 P.2d 1277 (Ct. App. 1996)

Sherman D. PACKER, Plaintiff,

v.

NATIONAL SERVICE INDUSTRIES, INC., a Delaware corporation; Defendant and Appellant,

B.W. Norton Manufacturing Company, Inc., a California corporation; and International Machine and Tool Works, Inc., an Illinois corporation, Defendants and Appellee.

No. 950121–CA.

Court of Appeals of Utah.

Jan. 5, 1996.

Plaintiff brought negligence action against manufacturer and user of container lids. Manufacturer moved for summary judgment which the District Court, Salt Lake County, Pat B. Brian, J., granted. Co-defendant appealed. The Court of Appeals, Wilkins, J., held that user, as codefendant, did not have right to respond to summary judgment motion or appeal trial court's order granting motion.

Appeal dismissed.

1. Pleading ⇐183

In tort action involving multiple defendants, when no cross-claim was brought between defendants, and when one of defendants filed motion for summary judgment, co-defendant did not have right to respond to motion or appeal trial court's order granting motion; co-defendant could have protected its rights by filing cross-claim against other defendant or filing independent action claiming indemnity. U.C.A.1953, 78–27–43; Rules Civ.Proc., Rule 13(f).

2. Pleading ⇐147

Cross-claim may include claim that party against whom it is asserted is or may be liable to cross-claimant for all or part of claim asserted in action against cross-claimant. Rules Civ.Proc., Rule 13(f).

3. Judgment ⇐183

In civil action involving multiple defendants, when no cross-claim is brought between defendants, and when one of defendants files motion for summary judgment, co-defendant does not have right to respond to motion and, thus is barred from appealing trial court's ruling on summary judgment motion.

Todd S. Winegar, Wade S. Winegar, and Karra J. Porter, Salt Lake City, for Appellant.

Paul M. Belnap and Robert L. Janicki, and Michael S. Johnson, Salt Lake City, for Appellee.

Before ORME, BENCH and WILKINS, JJ.

WILKINS, Judge:

Appellant National Service Industries, Inc. (NSI) appeals a grant of summary judgment entered in favor of appellee B.W. Norton Manufacturing Company (Norton). We dismiss the appeal.

BACKGROUND

Sherman Packer injured his eye while opening a container of Hi–Foam Degreaser sold to him by NSI. Packer alleged that his injury resulted when the pry-out seal on the container's lid struck his eye. As a result, Packer filed suit against NSI and Norton. Neither NSI nor Norton filed cross-claims against each other. NSI and Norton were merely co-defendants in a case brought by Packer.

Norton had sold the pail and lid of the container that injured Packer to NSI, along with many other pails and lids. NSI was in the practice of placing bulk orders for these items with Norton. Norton manufactured the pails and lids, a process which included installing a pour spout with a pry-out seal made by another company into the lids, then shipped the pails and lids in bulk to NSI. Once NSI received the pails, it decided which of its products it would put into them, filled the pails with those products, and clamped the lids down. The container Packer was

opening when he was injured presumably had been through this process.

Norton filed a motion for summary judgment, which Packer announced he planned to oppose. However, at the last minute Packer decided not to respond to Norton's motion because he was "convinced there [was] no possible claim against Norton." Surprised that Packer was not opposing Norton's motion, NSI sought to oppose the motion for summary judgment. NSI filed a memorandum and argued against Norton's motion in court, over Norton's objection. Nevertheless, the court granted the motion for summary judgment, by which Norton was dismissed from the action. NSI settled with Packer and now appeals the trial court's order that granted Norton's motion for summary judgment.

ISSUE ON APPEAL

We address a single question on appeal: May a co-defendant in multi-party litigation oppose the summary judgment motion of another co-defendant brought against the plaintiff, when the co-defendant seeking to oppose the motion is not party to a cross-claim involving the moving co-defendant? This is a question of law which we review for correctness. *See generally, Nixon v. Salt Lake City Corp.*, 898 P.2d 265, 268 (Utah 1995).

ANALYSIS

[1] We dismiss NSI's appeal because we find that NSI was not a proper party to the motion for summary judgment brought by Norton, did not have a right under the Utah Rules of Civil Procedure to oppose Norton's motion, and does not have a right to appeal the court's order that granted Norton's motion.

[2] NSI was brought into this case by Packer. When the court granted Norton's motion for summary judgment, thereby dismissing Norton from the suit, Norton's alleged fault could no longer be considered in Packer's case against NSI. *See Sullivan v. Scoular Grain Co. of Utah*, 853 P.2d 877, 878 (Utah 1993) ("[A]n individual or entity dismissed from a case pursuant to an adjudication on the merits of the liability issue may not be included in the apportionment."). However, NSI could have protected its potential claim against Norton by filing a cross-claim against Norton under Utah Rule of Civil Procedure 13(f). "Such cross-claim may include a claim that the party against whom it is asserted is or *may be* liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant." *Yost ex rel. Yost v. State*, 640 P.2d 1044, 1047 (Utah 1981) (emphasis added).

NSI could also protect a possible claim against Norton by filing an independent action claiming indemnity, if filing a cross-claim was considered to be tactically undesirable. *See* Utah Code Ann. § 78–27–43 (1992) (stating that specific recently-amended sections of the code do not "affect[ ] or impair[ ] any right to indemnity ... arising from statute, contract, or agreement").

Furthermore, because NSI did not have a right to respond to Norton's motion for summary judgment against the plaintiff, NSI has no right to appeal the court's order granting Norton's motion. *See Morrison–Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1214 (9th Cir.1987) (holding that co-defendant "may not appeal dismissal of additional defendant from [plaintiff's] original claims, without itself being party-plaintiff to those claims," even though co-defendant's position may be affected by the resolution of plaintiff's claims against other defendant).

[3] Therefore, we hold that in a civil action involving multiple defendants, when no cross-claim is brought between the defendants, and when one of the defendants files a motion for summary judgment, a co-defendant does not have a right to respond to the motion. In addition, we hold that a co-defendant barred from arguing against the first defendant's motion is also barred from appealing the trial court's ruling on the first defendant's motion. The Utah Rules of Civil Procedure, along with the Utah Code, provide ample ways for a defendant to squarely contest a co-defendant's argument or motion by bringing a cross-claim or a separate action against the co-defendant. NSI should have followed one of these established, workable procedures.

Our holding on this issue disposes of the appeal.

CONCLUSION

Because NSI did not bring a cross-claim against Norton, NSI did not have a right to respond to Norton's motion for summary judgment or to appeal the court's order that granted Norton's motion. Dismissed.

ORME, P.J., and BENCH, J., concur.

Gregory S. HORRELL and Barbara Horrell, Plaintiffs and Appellants,

v.

UTAH FARM BUREAU INSURANCE COMPANY, a Utah corporation; and Farm Bureau Mutual Insurance Co., Defendants and Appellees.

No. 950059-CA.

Court of Appeals of Utah.

Jan. 5, 1996.

Insureds brought action against homeowners' insurer to recover for alleged misconduct in handling claim. The Third District Court, Salt Lake County, Kenneth Rigtrup, J., granted new trial on ground that prior trial erroneously required proof of arson and misrepresentation by clear and convincing evidence. Supreme Court granted petition for interlocutory appeal and turned case over to Court of Appeals. The Court of Appeals, Davis, Associate P.J., held that: (1) as matter of first impression, standard of proof was preponderance of the evidence, not clear and convincing evidence, and (2) erroneous instruction requiring clear and convincing was not harmless.

Affirmed.

1. Insurance ⇐429.1(8)

Insurer's defenses of arson and misrepresentation must be proved by preponderance of evidence, not clear and convincing evidence.

2. Appeal and Error ⇐1064.1(9)

Erroneous instruction that homeowners' insurer was required to prove defenses of arson and misrepresentation by clear and convincing evidence was not harmless in action by insured, even though jury found by preponderance of evidence that insureds' claim was not fairly debatable; jurors were asked to consider all evidence and to determine whether clear and convincing evidence established arson, they were also asked to determine whether claim was fairly debatable based on facts that were or should have been known when insurer denied claim, and jury thus could have concluded that claim was not fairly debatable when denied, but that subsequently obtained evidence would justify finding of arson by preponderance of the evidence.

Keith W. Meade, Salt Lake City, for Appellants.

Stephen G. Morgan and Cynthia K.C. Meyer, Salt Lake City, for Appellees.

Before DAVIS, BILLINGS, and WILKINS, JJ.

DAVIS, Associate Presiding Judge:

Gregory S. Horrell and Barbara Horrell challenge the trial court's order granting Utah Farm Bureau Insurance Company and Farm Bureau Mutual Insurance Company's (collectively referred to as Farm Bureau) motion for a new trial. We affirm.

FACTS

Shortly before midnight on October 3, 1990, the Horrell's residence caught fire. The fire was extinguished at approximately 2:48 a.m., but rekindled within a couple hours. The house was ultimately destroyed.

ADDENDUM 3

COURSE OF PROCEEDINGS UNDERLYING THE FIRST APPEAL

1. Appellee Norton moved for summary judgment against the plaintiff. Plaintiff obtained an extension of time to respond (R p. 15, l. 15-19) and told counsel for appellant NSI that he would respond (R pp. 15-16, l. 25-2).

2. Appellant NSI had not anticipated responding to Norton's motion for summary judgment. When plaintiff's counsel told counsel for NSI that plaintiff was not going to file a response, plaintiff's counsel said "whereupon, [counsel for NSI] had a small fit, and said he was going to file one. I said fine, go ahead. So, in fairness to [counsel for NSI] he did not know that [plaintiff] was not going to file a response, . . . until after [plaintiff's] response time was finished." (R pp. 15-16, l. 242). Counsel for appellant NSI responded within several working days. (R p. 9, l. 22-24).

3. At the summary judgment hearing appellee Norton argued that NSI's response was weeks late (since NSI did not request an extension, only the plaintiff did) (R p. 14, l. 19-25). Appellee Norton argued co-defendant NSI's response should be ignored, leaving the court no alternative except to grant Norton's unresisted motion. (Norton's reply memorandum, p. 2; see also R p. 24, l. 7-14).

4. NSI argued that it had no obligation to resist a codefendant's motion, and in fact, did not resist it as long as Norton's fault would be determined by the jury. (R p. 10, l. 12; p. 12, l. 1-5).

5. NSI requested more time to build a case against Norton and respond to the summary judgment if the court held that NSI had an obligation to step into plaintiff's shoes and prove the plaintiff's case against Norton, or risk having the jury not determine Norton's fault. (R pp. 11-12, l. 11-5; p. 23, l. 611).

6. Plaintiff's counsel maintained he was not obligated to file a response but that the Court ". . . has an obligation, under the rules, to decide the motion on the merits." (R p. 20, l. 1824) An "on the merits ruling would prevent Norton from having its fault proportionately determined by the jury.

7. With this unusual procedural position before it, the Court gave an "advisory opinion" and stated the Court was ". . . inclined to disregard the opposition to Norton's Motion for Summary Judgment filed by National Service Industry. And the reason being that it was not timely filed. . . . Therefore, the status of the record is that there is a Motion for Summary Judgment by the defendant Norton. The plaintiff has not responded And the Court is inclined to find that, based on the merits of the motion, that Norton is entitled to summary judgment." (R p. 24, l. 7-14).

8. NSI pointed out that the Court's advisory ruling would work a great injustice to ignore the merits of the motion yet grant the motion "on the merits." It would result in NSI paying for Norton's portion of fault. NSI also pointed out that codefendants seldom file responses to a co-defendant's motion for summary judgment, and that NSI had relied on plaintiff's counsel's representation that he would file a memorandum resisting the motion. (R pp. 24-25, l. 17-5).

9. Plaintiff's counsel agreed it would be unfair to ignore NSI's brief, since he had made the representation he would file an opposition to the motion, and plaintiff's counsel urged the court to consider the motion on the merits. (R pp. 15-16, l. 22-2)

10. With this procedural scenario before him, the court reversed the advisory ruling and agreed to hear the motion on . . . the merits, or lack thereof." (R p. 29, l. 13-18)

11. The lower court heard argument on the merits of Norton's motion for summary judgment and granted it. The lower court ruled that Norton's fault would not be determined by the jury. The Court ruled that Norton owed no duty to warn plaintiff and that the product was not defective as a matter of law.

12. NSI and plaintiff negotiated a settlement and release which compensated plaintiff for all of his damages, and plaintiff agreed to assign claims and assist NSI in seeking to have Norton's fault determined. Plaintiff dismissed his claims against NSI The lower court's summary judgment against plaintiff, thus became final and was appealed.

ADDENDUM 4

STATEMENT OF FACTS UNDERLYING THE FIRST APPEAL

1. The seal which injured plaintiff's eye, with the instruction "Pry Out" imprinted on it, was made by International. Norton purchased the seal and lid component from International and incorporated the seal into the top of Norton's pail. (Howard Norton depo. p. 50, l. 16-22: p. 19, l. 5-13)

2. NSI received the container top, including the seal, as one unit, preassembled by Norton. (Howard Norton Depo. p. 19, l. 8-13).

3. Plaintiff followed Norton's imprinted instructions by prying the seal off with his pocket knife. Plaintiff describes his accident:

> I read the instructions [NSI's] to see how much product I was going to need, and to see how to use the product. And at that point, I attempted to remove the lid so that I could pour out the amount of product that I needed to use to clean the engine off with. I unscrewed the cap. After, you know, unscrewing the cap, it had the safety seal, which was a little metal ring and embossed in it was the words, "Pry out," [International/Norton's instruction] with an arrow pointing down. At that point, I took my pocketknife out of my pocket, pried where it said to pry, heard an explosion, felt something instantaneously contact my eye, and felt pain.

(Plaintiff's depo. pp. 35-36, l. 16-1) 4. There was also a printed label of instructions attached to the container by NSI. The NSI label gave instructions on how to use the product itself.

5. Norton holds itself out as a "leading supplier of shipping containers for the Western United States"; that their ". . . pails are manufactured to meet the standards of the Department of Transportation" and that "Norton Manufacturing is a major supplier for many industries including paint, petroleum, chemical, food, roofing, ag chem adhesives and ink." (Howard Norton depo. Exhibit 1) The pail is normally used to ship liquids. (Norton depo. p. 33, l. 15-19)

6. Mr. Norton knew of nothing that indicated the plaintiff did anything improper in removing the lid. (Howard Norton depo. pp. 51-52, l. 24-2)

7. The seal's purpose is a "tamper proof seal." (Deposition of Norton employee Gerald Bettridge, p. 30, l. 12)

8. NSI filled the pail with soap, without any alteration of the seal, and crimped the top onto the pail. NSI then sold the pail and its ingredients to plaintiff. (R p. 3, l. 18-19)

9. Dr. Noel de Nevers, a professor of chemical engineering at the University of Utah Engineering Department, testified that the accident ". . . was caused by the inner seal piece being driven by gas pressure into the eye of the plaintiff" (de Nevers depo., p. 8, l. 14-20).

10. Dr. de Nevers thought that the pressure may have been created by chemical reactions in the NSI product, or perhaps by formation of Peroxides. Dr. de Nevers ran gas chromatograph and mass spectoptometry tests, and consulted with other experts. He concluded:

> Q. And the other possibility is some chemical reaction, but you've fairly well ruled that out.
>
> A. I can find no evidence to support it. That doesn't guarantee that it did not occur
>
> Q. But in your opinion, it did not occur?
>
> A. I believe it did not occur.

(de Nevers Depo. p. 57, 1.13-18; see, also, p. 28, l. 4-13; pp. 52-53, l. 9-9; p. 54, l. 17-25; p. 57, l. 13-18)

11. Dr. Fineman, NSI's chemist, testified that the ingredients in NSI's soap cannot cause a pressure buildup. ". . . as a chemist, I have to respond by telling you that there's no basis whatever for any pressure buildup in this product." (Fineman depo. pp. 32-33, l. 23-4; p. 36, l. 7-22)

12. Dr. de Nevers eliminated any chemical reaction of the contents of the container as the cause of the accident. Rather than the contents causing pressure, plaintiff's expert testified that plaintiff's accident occurred because of pressurization due to:

> (a) Change in altitude. The product was packaged at sea level. When opened in Utah's higher altitude, the atmospheric

pressure was less, making the container "pressurized" in relation to the outside air, independent of the container's contents; and

(b) the product was packaged at a slightly lower temperature than the temperature when opened. Higher temperatures can create higher pressure inside the can. Dr. de Nevers was uncertain about the affect of temperature on the NSI can.

ADDENDUM 5

Order of Dismissal and Summary Judgment

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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---oooOooo---

NATIONAL SERVICE INDUSTRIES, INC.,	:	ORDER OF DISMISSAL AND SUMMARY JUDGMENT
Plaintiff,	:	
vs.	:	
B.W. NORTON MANUFACTURING COMPANY, INC., a California corporation; and INTERNATIONAL MACHINE & TOOL WORKS, INC., an Illinois corporation,	:	Civil No. 950900951 Judge Timothy R. Hanson
Defendants.	:	

---oooOooo---

The above-entitled matter came before the court on the motion to dismiss of B.W. Norton Manufacturing Company, Inc. on September 1, 1995. The court having reviewed the memoranda submitted prior to that hearing and having considered oral argument of counsel presented at the hearing determined as a matter of law that the first and second causes of action in the plaintiff's complaint fail to state a claim upon which relief could be granted since the causes of action in

substance requested relief by way of contribution from defendant Norton to the settlement made by the plaintiff to the plaintiff Sherman Packer in the Packer v. National Service Industries, Inc. et al.. Civil No. 920902466 (hereinafter Packer litigation).

The Court indicated it thought the third and fourth causes of action should be dismissed based on res judicata, but that it was not properly before the Court as a motion for summary judgment. Rather than force a refiling of a second similar motion, counsel for NSI agreed that the court could consider Norton's motion to dismiss as a motion for summary judgment on the third and fourth causes of action, with each party to submit an additional brief.

Accordingly, the court considered the additional legal briefing submitted and reviewed the judgment from the Packer litigation and in that regard determined that the Packer litigation resulted in a final judgment in favor of B.W. Norton Manufacturing Company, Inc. (hereinafter Norton).

On September 12, 1994, the court in the Packer litigation entered a summary judgment order dismissing the claims of the plaintiff Packer brought against Norton.

NSI had opposed the summary judgment of Norton in the Packer litigation and the court had considered the arguments of NSI.

This court determines that the issues raised by NSI in the instant case are barred by res judicata doctrine as that principle had been established by appellate level courts in this state in cases including D'Astin v. Astin, 844 P.2d 345, 350 (Utah App. 1992), Jacobsen v. Jacobsen, 703 P.2d 303, 305 (Utah 1985), and Smith v. Smith, 793 P.2d 407, 409 (Utah App. 1990).

Accordingly, this court determines that claims one and two of the plaintiff fail to state a claim upon which relief can be granted and further that claims three and four of the plaintiff are barred by res judicata in that the issues were litigated or could have been litigated in the Packer litigation between the same parties who are now before this court and said issues have been determined in a final judgment on the merits in the Packer litigation.

For good cause appearing, it is

HEREBY ORDERED, ADJUDGED, AND DECREED, that the motion to dismiss of Norton is granted and further, this court dismiss claims one and two of NSI as a matter of law, and grants summary judgment of claims three and four for the reasons stated above and also covered in this court's Minute Entry of October 16, 1995, and therefore the claims of the plaintiff NSI are dismissed against the defendant B.W. Norton Manufacturing Company, Inc., with prejudice.

DATED this 30 day of ~~November 1995.~~ Jan. 1996

BY THE COURT

By _____
Timothy R. Hanson
District Court Judge

APPROVED AS TO FORM:

_____
Todd S. Winegar
Counsel for NSI